Chapter 3

THE CONCEPT OF PROPERTY AND SOME ILLUSTRATIVE CASES

Section 1. THE UTILITARIAN THEORY

Justifications of property on utilitarian grounds are at least as old as David Hume, the eighteenth-century Scottish empirical philosopher. In Hume's treatment, the utilitarian argument is at once an answer to Locke—property is not a natural right but a product of civil society—and a justification of property—civil society needs a concept of property in order to operate. *See* L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 57–64 (1970); Berry, *Property and Possession: Two Replies to Locke-Hume and Hege*l, in PROPERTY 89–95 (J. Pennock & J. Chapman eds., Nomos No. 22, 1980). The following extracts expand on Hume's ideas in two different directions: the first from the great utilitarian philosopher Jeremy Bentham, emphasizes how dependent property is on society; the second, by a modern economist, emphasizes how important property is for maximizing the wealth of society:

J. BENTHAM, THEORY OF LEGISLATION
111–13 (R. Hildreth ed. 1864)[1]

The better to understand the advantages of law let us endeavor to form a clear idea of property. We shall see that there is no such thing as natural property, and that it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it-none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The ailment which is incorporated into my very body may belong to another, to whom I am bound to account for it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

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[1] First edition 1811.

But it may be asked, What is it that serves as a basis to law, upon which to begin operations, when it adopts objects which, under the name of property, it promises to protect? Have not men, in the primitive state, a natural expectation of enjoying certain things,-an expectation drawn from sources anterior to law?

Yes. There have been from the beginning, and there always will be, circumstances in which a man may secure himself by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession- If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which in the natural state was an almost invisible thread, in the social state becomes a cable.

Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

DEMSETZ, TOWARD A THEORY OF PROPERTY RIGHTS

57 (79) AM. ECON. REV. (Papers & Proceedings) 347 (1967).

When a transaction is concluded in the marketplace, two bundles of property rights are exchanged. A bundle of rights often attaches to a physical commodity or service, but it is the value of the rights that determines the value of what is exchanged. Questions addressed to the emergence and mix of the components of the bundle of rights are prior to those commonly asked by economists. Economists usually take the bundle of property rights as a datum and ask for an explanation of the forces determining the price and the number of units of a good to which these rights attach.

In this paper, I seek to fashion some of the elements of an economic theory of property rights. . . . If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects. . . .

I do not mean to assert or to deny that the adjustments in property rights which take place need be the result of a conscious endeavor to cope with new externality problems. These adjustments have arisen in Western societies largely as a result of gradual changes in social mores and in common law precedents. At each step of this adjustment process, it is unlikely that externalities per se were consciously related to the issue being resolved. These legal and moral experiments may be hit-and-miss procedures to some extent but in a society that weights the achievement of efficiency heavily, their viability in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market values. . . .

The question of private ownership of land among aboriginals has held a fascination for anthropologists. It has been one of the intellectual battlegrounds in the attempt to assess the “true nature” of man unconstrained by the “artificialities” of civilization. In the process of carrying on this debate, information has been uncovered that bears directly on the thesis with which we are

now concerned. What appears to be accepted as a classic treatment and a high point of this debate is Eleanor Leacock's memoir on *The Montagnes "Hunting Territory" and the Fur Trade*. Leacock's research followed that of Frank G. Speck who had discovered that the Indians of the Labrador Peninsula had a long-established tradition of property in land. This finding was at odds with what was known about the Indians of the American Southwest and it prompted Leacock's study of the Montagnes who inhabited large regions around Quebec.

Leacock clearly established the fact that a close relationship existed, both historically and geographically, between the development of private rights in land and the development of the commercial fur trade. The factual basis of this correlation has gone unchallenged. However, to my knowledge, no theory relating privacy of land to the fur trade has yet been articulated. . . .

Because of the lack of control over hunting by others, it is in no person's interest to invest in increasing or maintaining the stock of game. Overly intensive hunting takes place. Thus a successful hunt is viewed as imposing external costs on subsequent hunters-costs that are not taken into account fully in the determination of the extent of hunting and of animal husbandry.

Before the fur trade became established, hunting was carried on primarily for purposes of food and the relatively few furs that were required for the hunter's family. The externality was clearly present. Hunting could be practiced freely and was carried on without assessing its impact on other hunters. But these external effects were of such small significance that it did not pay for anyone to take them into account. There did not exist anything resembling private ownership in land. . . .

We may safely surmise that the advent of the fur trade had two immediate consequences. First, the value of furs to the Indians was increased considerably. Second, and as a result, the scale of hunting activity rose sharply. . . . The next step toward the hunting territory was probably a seasonal allotment system. An anonymous account written in 1723 states that the "principle of the Indians is to mark off the hunting ground selected by them by blazing the trees with their crests so that they may never encroach on each other. . . . By the middle of the century these allotted territories were relatively stabilized."

The principle that associates property right changes with the emergence of new and reevaluation of old harmful and beneficial effects suggests in this instance that the fur trade made it economic to encourage the husbanding of fur-bearing animals. Husbanding requires the ability to prevent poaching and this, in turn, suggests that socioeconomic changes in property in hunting land will take place. The chain of reasoning is consistent with the evidence cited above. . . .

The lands of the Labrador Peninsula shelter forest animals whose habits are considerably different from those of the plains. Forest animals confine their territories to relatively small areas, so that the cost of internalizing the effects of husbanding these animals is considerably reduced. This reduced cost, together with the higher commercial value of fur-bearing forest animals, made it productive to establish private hunting lands. Frank G. Speck finds that family proprietorship among the Indians of the Peninsula included retaliation against trespass. Animal resources were husbanded. Sometimes conservation practices were carried on extensively. Family hunting territories were divided into quarters. Each year the family hunted in a different quarter in rotation, leaving a tract in the center as a sort of bank, not to be hunted over unless forced to do so by a shortage in the regular tract. . . .

If a single person owns land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land rights. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death. It is very difficult to see how the existing communal owners can reach an agreement that takes account of these costs.

In effect, an owner of a private right to use land acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future. But with communal rights there is no broker, and the claims of the present generation will be given an uneconomically large weight in determining the intensity with which the land is worked. Future generations might desire to pay present generations enough to change the present intensity of land usage. But they have no living agent to place their claims on the market. . . .

The resulting private ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently.

. . . Much internalization is accomplished in this way. But the owner of private rights to one parcel does not himself own the rights to the parcel of another private sector. Since he cannot exclude others from their private rights to land, he has no direct incentive (in the absence of negotiations) to economize in the use of his land in a way that takes into account the effects he produces on the land rights of others. If he constructs a dam on his land, he has no direct incentive to take into account the lower water levels produced on his neighbor's land.

This is exactly the same kind of externality that we encountered with communal property rights, but it is present to a lesser degree. Whereas no one had an incentive to store water on any land under the communal system, private owners now can take into account directly those benefits and costs to their land that accompany water storage. But the effects on the land of others will not be taken into account directly.

The partial concentration of benefits and costs that accompany private ownership is only part of the advantage this system offers. The other part, and perhaps the most important, has escaped our notice. The cost of negotiating over the remaining externalities will be reduced greatly. Communal property rights allow anyone to use the land. Under this system it becomes necessary for all to reach an agreement on land use. But the externalities that accompany private ownership of property do not affect all owners, and, generally speaking, it will be necessary for only a few to reach an agreement that takes these effects into account. . . .

Suppose an owner of a communal land right, in the process of plowing a parcel of land, observes a second communal owner constructing a dam on adjacent land. The farmer prefers to have the stream as it is, and so he asks the engineer to stop his construction. The engineer says, "Pay me to stop." The farmer replies, "I will be happy to pay you, but what can you guarantee in return?" The engineer answers, "I can guarantee you that I will not continue constructing the dam, but I cannot guarantee that another engineer will not take up the task because this is communal property; I have no right to exclude him." What would be a simple negotiation between two persons under a private property arrangement turns out to be a rather complex negotiation between the farmer and everyone else. This is the basic explanation, I believe, for the preponderance of single rather than multiple owners of property. Indeed, an increase in the number of owners is an increase in the communality of property and leads, generally, to an increase in the cost of internalizing.

The reduction in negotiating cost that accompanies the private right to exclude others allows most externalities to be internalized at rather low cost. Those that are not are associated with activities that generate external effects impinging upon many people. The soot from smoke affects many homeowners, none of whom is willing to pay enough to the factory to get its owners to reduce smoke output. All homeowners together might be willing to pay enough, but the cost of their getting together may be enough to discourage effective market bargaining. The negotiating problem is compounded even more if the smoke comes not from a single smoke stack but from an

industrial district. In such cases, it may be too costly to internalize effects through the marketplace. . . .

What I have suggested in this paper is an approach to problems in property rights. But it is more than that. It is also a different way of viewing traditional problems. An elaboration of this approach will, I hope, illuminate a great number of social-economic problems.

Note

Of the two elements in the utilitarian theory of property, the first-that property is a product of civil society not of "natural law"-is widely accepted today in American legal discourse. Justice Holmes once said: "[F]or legal purposes a right is only the hypostasis of a prophecy-the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it. . . ." Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918). Holmes' aphorism became an article of faith among the American legal realists of the 1920's and 30's. Although few judges today would put it in the starkly realist fashion in which Holmes puts it, the idea that all rights, including property rights, are dependent on state intervention has become a fixture. We will see shortly that this fact has caused considerable difficulty, particularly in the field of constitutional interpretation. The Constitution is a document much more imbued with the spirit of Locke than with that of Bentham. Once one decides that there is no independent natural right to property, how is one to interpret such clauses as the "takings" clause of the fifth amendment "nor shall private property be taken for public use, without just compensation"? If "property" is nothing more than what the courts say it is, what are the courts to say that it is?

Bentham does suggest, if not an answer, at least a line of approach: "The legislator owes the greatest respect to this expectation which he himself has produced." A number of cases, including the ones with which we will deal immediately below raise the question whether "the legislator" has in fact produced this expectation. But even if he has, why should he have "the greatest respect" for it? "When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it he always produces a proportionate sum of evil." This, of course, assumes that maximization of the happiness of society is the function of "the legislator." But even if we assume that it is, it still does not solve the problem: May the legislator take away a small piece of property from you, a piece of property which only makes you mildly happy, in order to give it to many people whom it would make ecstatic? This is a question to which we will return a number of times, not only below, but also in Chapters 3 and 8.

The Demsetz piece goes a step further. It suggests not only that maximization of happiness is the appropriate goal for the legislator, but that the best measure of happiness is wealth. It further suggests that the legislator, having established the property system, should intervene only in those situations in which the transactions costs are so high that voluntary solutions to a problem will not take place. Neither of these extensions of Bentham's ideas is universally accepted today in American legal discourse, although there are those who believe that both should be accepted. *See*, *e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW ch. 2 (3d ed. 1986); *but see* Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980). We will have a number of occasions to consider the implications of Professor Demsetz' theory, particularly in Chapters 3 and 8. In the meantime you might want to reconsider Pierson v. Post in the light of Professor Demsetz' theory. For an application of it to a problem similar, but not quite identical, to Pierson, see Agnello & Donnelly, *Property Rights and Efficiency in the Oyster Industry*, 18 J. LAW & ECON. 521 (1975).

COASE, THE PROBLEM OF SOCIAL COST

3 J. LAW & ECON. 1 (1960)

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This paper is concerned with those actions of business firms which have harmful effects on others. The standard example is that of a factory the smoke from which has harmful effects on those occupying neighbouring properties. The economic analysis of such a situation has usually proceeded in terms of a divergence between the private and social product of the factory, in which economists have largely followed the treatment of Pigou in *The Economics of Welfare*. The conclusions to which this kind of analysis seems to have led most economists is that it would be desirable to make the owner of the factory liable for the damage caused to those injured by the smoke, or alternatively, to place a tax on the factory owner varying with the amount of smoke produced and equivalent in money terms to the damage it would cause, or finally, to exclude the factory from residential districts (and presumably from other areas in which the emission of smoke would have harmful effects on others). It is my contention that the suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable. . . .

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. . . .

The harmful effects of the activities of a business can assume a wide variety of forms. An early English case concerned a building which, by obstructing currents of air, hindered the operation of a windmill.[1] A recent case in Florida concerned a building which cast a shadow on the cabana, swimming pool and sunbathing areas of a neighbouring hotel.[2] . . . To clarify the nature of my argument and to demonstrate its general applicability, I propose to illustrate it . . . by reference to [several] actual cases.

Let us first [consider] the case of *Sturges v. Bridgman*[3] . . . . In this case, a confectioner (in Wigmore Street) used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room. "In particular . . . the noise prevented him from examining his patients by auscultation[4] for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention." The doctor therefore brought a legal action to force the confectioner to stop using his machinery. The courts had little difficulty in granting the doctor the injunction he sought. "Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of

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[1] *See* Gale on Easements 237–39 (13th ed. M. Bowles 1959).

[2] *See* Fontaineble[a]u Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla.App.1959).

[3] 11 Ch.D. 852 (1879).

[4] Auscultation is the act of listening by ear or stethoscope in order to judge by sound the condition of the body.

the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes."

The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But, of course, it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties. The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionary business to some other location. The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's.[5] But now consider the situation if the confectioner had won the case. The confectioner would then have had the right to continue operating his noise and vibration-generating machinery without having to pay anything to the doctor. The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery. If the doctor's income would have fallen more through continuance of the use of this machinery than it added to the income of the confectioner, there would clearly be room for a bargain whereby the doctor paid the confectioner to stop using the machinery. That is to say, the circumstances in which it would not pay the confectioner to continue to use the machinery and to compensate the doctor for the losses that this would bring (if the doctor had the right to prevent the confectioner's using his machinery) would be those in which it would be in the interest of the doctor to make a payment to the confectioner which would induce him to discontinue the use of the machinery (if the confectioner had the right to operate the machinery). . . . With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources. It was of course the view of the judges that they were affecting the working of the economic system—and in a desirable direction. . . . The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. . . .

Judges have to decide on legal liability but this should not confuse economists about the nature of the economic problem involved. . . . The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place. . . . If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating pricing system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties. . . .

The reasoning employed by the courts in determining legal rights will often seem strange to an economist because many of the factors on which the decision turns are, to an economist, irrelevant. Because of this, situations which are, from an economic point of view, identical will be treated quite differently by the courts. The economic problem in all cases of harmful effects is how to maximise the value of production. . . . But it has to be remembered that the immediate

[5] Note that what is taken into account is the change in income after allowing for alterations in methods of production, location, character of product, etc.

question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production. . . .

The argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

In earlier sections, when dealing with the problem of the rearrangement of legal rights through the market, it was argued that such a rearrangement would be made through the market whenever this would lead to an increase in the value of production. But this assumed costless market transactions. Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved. . . .

. . . In such cases, the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out. . . .

The discussion in this section has, up to this point, been concerned with court decisions arising out of the common law relating to nuisance. Delimitation of rights in this area also comes about because of statutory enactments. Most economists would appear to assume that the aim of governmental action in this field is to extend the scope of the law of nuisance by designating as nuisances activities which would not be recognized as such by the common law. And there can be no doubt that some statutes, for example, the Public Health Acts, have had this effect. But not all Government enactments are of this kind. The effect of much of the legislation in this area is to protect businesses from the claims of those they have harmed by their actions. . . .

The legal position in the United States would seem to be essentially the same as in England, except that the power of the legislatures to authorize what would otherwise be nuisances under the common law, at least without giving compensation to the person harmed, is somewhat more limited, as it is subject to constitutional restrictions. Nonetheless, the power is there and cases more or less identical with the English cases can be found. . . .

There can be little doubt that the Welfare State is likely to bring an extension of that immunity from liability for damage, which economists have been in the habit of condemning (although they have tended to assume that this immunity was a sign of too little Government intervention in the economic system). . . .

Notes and Questions

1. Professor Coase's ultimate conclusion that, assuming zero transaction costs, liability rules have no effect on resource allocation has received both serious criticism (*e.g.*, Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427 (1972)) and staunch defense (*e.g.* Demsetz, *When Does the Rule of Liability Matter?*, 1 J.LEGAL STUD. 13 (1972)). *See also* Hoffman & Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & ECON. 73 (1982).

Consider the following commentary on Coase:

> The mechanism [Coase presupposes] for achieving efficiency in the absence of competitive markets is bargaining. For example, Calabresi formulated the Coase Theorem as follows: "If one assumes rationality, no transaction costs, and no legal impediments to bargaining, *all* misallocation of resources would be fully cured in the market by bargains." This formulation apparently presupposes a general proposition about bargaining, namely, "Bargaining games with zero transaction costs reach efficient solutions."
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> In order to evaluate this interpretation of Coase, we must explain the place of bargaining in game theory. A zero-sum game is a game in which total winnings minus total losses equals zero. Poker is an example. A zero-sum game is a game of pure redistribution, because nothing is created or destroyed. By contrast, a coordination game is a game in which the players have the same goal. For example, if a phone conversation is cut off, then the callers face a coordination problem. The connection cannot be restored unless someone dials, but the call will not go through if both dial at once. The players win or lose as a team, and winning is productive, so coordination games are games of pure production.
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> A bargaining game involves distribution and production. Typically, there is something to be divided called the *stakes*. For example, one person may have a car to sell and the other may have money to spend. The stakes are the money and the car. If the players can agree upon a price for the car, then both of them will benefit. The *surplus* is the joint benefits from cooperation, for example, consumer's surplus plus seller's surplus in our example of the car. If the players cannot agree upon how to divide the stakes, then the surplus will be lost. In brief, bargaining games are games in which production is contingent upon agreement about distribution.
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> The bargaining version of the Coase Theorem takes an optimistic attitude toward the ability of people to solve this problem of distribution. The obstacles to cooperation are portrayed as the cost of communicating, the time spent negotiating, the cost of enforcing agreements, etc. These obstacles can all be described as transaction costs of bargaining. Obviously, we can conceive of a bargaining game in which these costs are nil.
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> A pessimistic approach assumes that people cannot solve the distribution problem even if there are no costs to bargaining. According to this view, there is no reason why rationally self-interested players should agree about how to divide the stakes. The distribution problem is unsolvable by rational players. To eliminate the possibility of noncooperation, we would have to eliminate the problem of distribution, that is, to convert the bargaining game into a coordination game. But it makes no sense to speak about a bargaining game without a problem of distribution.
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> Our example of selling a car illustrates the collision of these two viewpoints. The costs of communicating, writing a contract, and enforcing its terms are the transaction costs of buying

or selling a car. These costs sometimes constitute an obstacle to exchange. However, there is another obstacle of an entirely different kind, namely the absence of a competitive price. The parties must haggle over the price until they can agree upon how to distribute the gains from trade. There is no guarantee that the rational pursuit of self-interest will permit agreement. If we interpret zero transaction costs to mean that there is no dispute over price, then we have dissolved the bargaining game.

The polar opposite of the optimistic bargaining theorem can be stated as follows: "Bargaining games have noncooperative outcomes even when the bargaining process is costless." This line of thought suggest the polar opposite of the Coase Theorem: "Private bargaining to redistribute external costs will not achieve efficiency unless there is an institutional mechanism to dictate the terms of the contract." We have already discussed one institutional mechanism to achieve efficiency, namely a competitive market, which eliminates the power of parties to threaten each other. Another such institution is compulsary arbitration.

The conception of law which is the polar opposite to Coase is articulated in Hobbes and is probably much older. It is based upon the belief that people will exercise their worst threats against each other unless there is a third party to coerce both of them. The third party for Hobbes is the prince or leviathan—we would say dictatorial government—who has unlimited power relative to bargainers. Without his coercive threats, life would be "nasty, brutish, and short." We shall refer to the polar opposite of the Coase theorem as the Hobbes Theorem. . . .

The Coase Theorem and the Hobbes Theorem have contradictory implications for the size of government. We can see this point most clearly by considering the policy implications in the ideal world of zero transaction costs. According to the Coase Theorem, there is no continuing need for government under these conditions. Like the deist god, the government retires from the scene after creating some rights over externalities, and efficiency is achieved regardless of what rights were created. According to the Hobbes Theorem, the coercive threats of government or some similar institution are needed to achieve efficiency when externalities create bargaining situations, even though bargaining is costless. Like the theist god, the government continuously monitors private bargaining to insure its success.

The Coase Theorem represents extreme optimism about private cooperation and the Hobbes Theorem represents extreme pessimism. Perhaps the Coase Theorem is more accurate than the Hobbes Theorem in the sense that gains from trade in bargaining situations are more often realized than not, or perhaps the Hobbes Theorem is more accurate from the perspective of lawyers who must pick up the pieces when cooperation fails. We shall not attempt an allocation of truth. The strategic considerations are not normally insurmountable, as suggested by Hobbes, or inconsequential, as suggested by Coase. An informed policy choice must balance the Coase Theorem against the Hobbes Theorem in light of the ability of the parties to cooperate. . . .

Cooter, *The Cost of Coase*, 11 J.LEGAL STUD. 1, 16–20 (1982).

2. Does Coase's analysis give you any help in dealing with the points of nuisance law detail discussed in the preceding pages? Quite a number of legal writers have found it a useful starting point on the kind of questions surveyed in this section. With real nuisance cases this, obviously, involves assimilating somehow the reality of significant, sometimes overwhelming, transaction costs. One recent author, for example, finds that there may be a justification for the traditional rule (*supra*, p. S**Error! Bookmark not defined.**) that imposes liability and awards injunctions almost automatically in trespass cases but not in nuisance cases because trespass cases are ones in which the transactions cost of a bargained solution are likely to be low and hence the legal result is more likely to be overturned by negotiation than in nuisance cases which are more likely to involve high transactions costs of bargaining and must therefore be subject to more complicated

(and costly) entitlement-determining rules. Merill, *Trespass*, *Nuisance and the Costs of Determining Property Rights*, 14 J.LEGAL STUD. 13 (1985).

3. Coase deals with harmful effects. The physical interdependence of private landholdings can also produce an uncompensated flow of benefits to which similar economic analysis can be supplied. *See* Cho, *Externalities and Land Economics*, 47 LAND ECON. 65 (1971). Professor Cho's hypothetical example is a denuded hilly parcel owned by *A* immediately adjacent to a farm owned by *B*. Were *A* to plant trees (requiring an investment of $10,000) it would improve the fertility of *B*'s farm (present value of the benefit $2,000). However, without some inducement *A* will not plant those trees, for the present value of their future worth as timber is only $9,000. *Id*. at 68. Does *B*, should *B*, have an action in nuisance for damages or an injunction based on *A*'s refusal to plant trees? How does one distinguish harm from a benefit denied? Which is involved in the case of a building which blocks a neighbor's solar collector? How does the existence of external benefits affect one's judgment about proper treatment for an alleged nuisance? *Cf*. Michelman, *Book Review*, 80 YALE L.J. 647, 681–83 (1971). *See generally* Honabach, *Windfalls*, *Wipeouts*, *and Nuisance Law: Strict Liability With or Without Restricted Damages*, 19 URB.L.ANN. 3 (1980).

4. Does any of this cast new light on the problem posed by the *Boomer* case—namely, when a defendant held to have committed an actionable nuisance and therefore liable for damages, should be allowed to continue unhindered by injunction? Many authors in the "law and economics" tradition argue for a preference, in some cases a strong preference, for damage remedies, at least in most situations. *See*, *e.g*., Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA.L.REV. 1299, 1309–48 (1977); Ellickson, *Alternatives to Zoning: Covenants*, *Nuisance Rules*, *and Fines as Land Use Controls*, 40 U.CHI.L.REV. 681, 738–48 (1973); Calabresi & Melamed, *Property Rules*, *Liability Rules*, *and Inalienability: One View of the Cathedral*, 85 HARV.L.REV. 1089, 1115–24 (1972); G. CALABRESI, THE COSTS OF ACCIDENTS, 68–197 (1970). Can you see why? The wisdom of this preference was challenged in Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN.L.REV. 1075 (1980), in which the author argues that the desirable solution may depend on the extent to which redistribution rather than compensation is a desired goal of the process and also on the extent to which the court can accurately assess the costs to the parties of the alternatives. Polinsky's conclusions are questioned but not upset in Burrows, *Efficiency Levels*, *Efficiency Gains and Alternative Nuisance Remedies*, 5 INT'L REV.L. & ECON. 59 (1985).

5. Assuming that damages are going to be awarded, does it make sense that they be calculated, as they generally are now, on the basis of what the plaintiff has actually lost, as opposed to what it cost him to prevent the damage? For an argument that defendants in nuisance actions should have to pay for potential plaintiffs' prevention costs but then should be liable only for those losses that plaintiffs suffer having taken (or having been assumed to have taken) reasonable prevention measures, see Rose-Ackerman, *Dikes*, *Dams*, *and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J.LEGAL STUD. 25 (1989).

6. A student note, *An Economic Analysis of Land Use Conflicts*, 21 STAN.L.REV. 293 (1969), reaches some interesting conclusions about how certain nuisance controversies ought to be handled. Limiting itself to "either or" cases, that is, those in which accommodation is not feasible, so that the solution must lie in either the plaintiff's relocating or the defendant's ceasing operation, the note proposes different solutions for two types of cases: (a) those in which the incompatible uses developed concurrently; and (b) those in which one or the other party was established first. In the first type of case, it would have a court determine which of the parties can eliminate the conflict for the least monetary cost to society and then force that resolution. If it is the defendant, this is done by granting an injunction; if the plaintiff, by denying an injunction. In

either event the "winning" party would be required to share the "loser's" costs. This last feature is, the author contends, based upon a point made by Coase:

> Because both the uses caused the conflict, both should share its costs. This notion is not based on a "fault" theory; . . . no discussion of "fault" is appropriate to concurrent cases. Rather, the notion is based on general principles of resource allocation . . . . An activity must be forced to "internalize" its external costs if we are to ensure that it makes its pricing decisions in a manner that will maximize the total value of goods and services in society.

Id. at 302.

The rule proposed for "sequential" cases is that the second user be permitted to stay only on condition that he pay the full costs of relocating the first. *Id*. at 303–08.

Does the note's proposal seem a sound one? If you agree with it, how would you draw the line between the two types of cases? *See id*. at 308–09. How would you deal with external costs and benefits falling upon neighboring owners who are not parties to the suit? *See id*. at 301. *See also* Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance"*, 9 J.LEGAL STUD. 557 (1980).

7. In addition to the literature cited above, *see generally* Manson, *A Reexamination of Nuisance Law*, 8 HARV.J.L. & PUB.POL'Y 185 (1985); White, *Economics and Nuisance Law: Comment on Manson*, *id*. 213; Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J.LEGAL STUD. 49 (1979); Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NAT.RESOURCES J. 89 (1973); Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A.L.REV. 429 (1971).

SHELLEY v. KRAEMER

Supreme Court of the United States.
334 U.S. 1 (1948).

VINSON, C.J. These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

[The facts in the first of the two cases are as follows:] . . . On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

". . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to [or] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." . . .

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the

restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question. . . .

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.[1] . . .

I.

. . .

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, 1978 of the Revised Statutes, derived from 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of Buchanan v. Warley, [245 U.S. 60 (1917)], a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. [Further case discussion omitted.] . . .

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. . . .

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[1] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . .

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. . . . [T]he examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in . . . Cantwell v. Connecticut, 310 U.S. 296 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. [Other examples omitted.] . . .

III.

. . .

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights

on an equal footing.

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U.S. 501 (1946). . . .

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

Notes and Questions[1]

1. In Barrows v. Jackson, 346 U.S. 249 (1953), the Court had occasion to comment on the language in *Shelley* to the effect that "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed by the Fourteenth Amendment." *supra* p. 180. Barrows involved not a suit for injunction as in Shelley but a suit for damages for violation of a racially restrictive covenant. The Court had little difficulty in finding that the awarding of damages would be just as much state action as the granting of an injunction. Further, the Court held, over Chief Justice Vinson's dissent, that the white defendant-vendor in the damage action had standing to raise the constitutional issue even though it was not his constitutional rights but

[1] These notes raise issues to which we will return in Chapters 4, 6, and 7, *infra*. Even if you do not fully understand the substantive law discussed in these notes, consider the number of areas to which *Shelley* might apply and keep this case in mind as you proceed further in the materials.

those of the black vendee (who was not a party to the suit) which were being violated by the covenant.

In the light of *Shelley* and *Barrows* consider the following case: In 1942 a group of neighbors in Denver, Colorado, got together and agreed on behalf of themselves, their heirs and assigns, to a racially restrictive covenant. The agreement further provided that if any of the property subject to the agreement

shall be conveyed or leased in violation of this agreement [the right, title, or interest of the owner so violating the agreement] shall be forfeited to and rest in such of the then owners of all of said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim. . . .

Plaintiffs, black owners of property subject to these restrictions, brought suit to quiet title against their white neighbors who had filed the requisite record notice. Defendants asserted that Barrows and Shelley were distinguishable on the ground that the instant case did not involve judicial enforcement of a restrictive covenant by injunction or damages. Rather, they claimed, the agreement in question created a future interest known as an executory interest in plaintiffs' land:

"Such interest vested automatically in the defendants upon the happening of the events specified in the original instrument of grant, and the validity of the vesting did not in any way depend upon judicial action by the courts. The trial court's failure and refusal to recognize the vested interest of the defendants, and its ruling that the defendants have no title or interest in or to the property, deprived the defendants of their property without just compensation and without due process of law."

Capitol Federal Savings & Loan Ass'n v. Smith, 136 Colo. 265, 268–69, 316 P.2d 252, 254 (1957), noted in 58 COLUM. L. REV. 571 (1958). The court was not impressed by the distinction:

> No matter by what ariose terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely settled by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.

Id. at 270, 316 P.2d at 255. (Can you see why the court said: "We are unable to rid ourselves of the impression that this writ of error is being prosecuted in the interest of title examiners, rather than in that of property owners . . ."? *Id.* at 270, 316 P.2d at 255.)

In Charlotte Park & Recreation Com'n v. Barringer, 242 N.C. 311, 320, 88 S.E.2d 114, 122 (1955), the Commission brought a declaratory judgment action to determine the validity of the restrictive clauses in deed to the City of Charlotte granting land "upon the following terms and conditions . . . to-wit . . . the lands hereby conveyed . . . shall be held, used and maintained . . . as an integral part of a park, playground and recreational area . . . to be used and enjoyed by persons of the white race only." The deed further provided: "In the event that the said lands . . . shall not be kept, used and maintained for park, playground, and-or recreational purposes, for the use of the white race only . . . then, . . . the lands hereby conveyed shall revert in fee simple to the said [grantor], his heirs and assigns." The court held that in the event the provisions were violated the land would revert to the grantor automatically and without any judicial enforcement-thus distinguishing Shelley-and that a contrary holding would deprive the grantor and his heirs of property without due process of law. Is the only difference between the Smith and Barringer cases that one court was in Colorado and the other in North Carolina? Don't make up your mind completely on these cases until you have read the materials on rights of entry, possibilities of reverter, executory interests and the Rule Against Perpetuities, *infra* pp. 391–430.

2. In 1911 United States Senator Augustus O. Bacon of Georgia gave property in trust to the City of Macon to use for a park for white citizens only. May the City maintain the park on a racially discriminatory basis? *See* Evans v. Newton, 382 U.S. 296 (1966); *cf.* Commonwealth of Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957). Assume that the Supreme Court holds that the City may not maintain the park in the way that the testator wished. May the state courts of Georgia now dissolve the trust and turn the park over to Senator Bacon's heirs? If the Georgia courts are allowed to do this, why would anyone bring this type of suit? The Supreme Court affirmed the state court's dissolution. Evans v. Abney, 396 U.S. 435 (1970). Would a contrary ruling have constituted a deprivation of property without due process of law?

3. If neighbors seek to enforce a restrictive covenant limiting lots in a subdivision to "single family occupancy" in order to prevent use of a home as a shelter for unrelated mentally retarded persons is the "state action" test met? If so is there a denial of equal protection. Compare Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F. Supp. 1152 (D. Puerto Rico 1990) with McGuire v. Bell, 297 Ark. 282, 761 S.W.2d 904 (1988). Cf. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

4. The equal protection clause is not the only constitutional standard which has imposed limits on state property law. The freedoms of speech, association, and religion can pose very similar issues. Here too "state action" must be found. Is there any reason to expect a different "state action" test? For example, if a community's exclusion of churches from large sections by zoning regulation violates the religious freedom of those who would use them (as a number of courts have held), is the same true of a restrictive covenant enforced by state courts? *See* Ginsberg v. Yeshiva of Far Rockaway, *infra* p. 995. *See generally* pp. 1000–01, *infra*.

5. Suppose that a landlord refuses to renew a tenant's lease because (a) the tenant has complained to the housing authorities about the condition of the premises, or (b) because the landlord and the tenant do not see eye to eye on political or religious questions. The tenant refuses to leave at the expiration of his lease, and the landlord sues to evict him. What Shelley v. Kraemer argument will the tenant make? Will he succeed? *See infra* pp. 701–15. Would it make any difference if the ground for refusal were that the landlord had just discovered that the tenant was of Irish ancestry? If the trespasser were not a tenant but an acquaintance refused a dinner invitation for any of the above reasons who came to the party, nonetheless, uninvited?

Section 2. THE PERSONALITY THEORY

Recognizing the inherent difficulties of the labor theory, especially with regard to government regulation, several influential philosophers in the late eighteenth and early nineteenth centuries asserted a very different justification for private property. The theory was first outlined by Kant. Man, he reasoned, acquires property not by mixing his labor with physical objects but by the transcendental process of directing his will toward the objects. The individual's property is then transformed into a right against other men by operation of the union of wills of men, which is expressed through public institutions. *See* R. SCHLATTER, PRIVATE PROPERTY 255–57 (1951).

Hegel further developed these ideas in *Philosophy of Right* (1821), and his version of the theory became the standard Idealist statement. Hegel, like Kant, rejected the labor theory and argued that the act of willing was what established property in an object.

G. HEGEL, PHILOSOPHY OF RIGHT

§§ 44–46, 49–53 (T. Knox ed. 1953)[1]

44. A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all "things". . . .

45. To have power over a thing ab extra constitutes possession. The particular aspect of the matter, the fact that I make something my own as a result of my natural need, impulse, and caprice, is the particular interest satisfied by possession. But I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of property, the true and right factor in possession.

If emphasis is placed on my needs, then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end.

46. Since my will, as the will of a person, and so as a single will, becomes objective to me in property, property acquires the character of private property; and common property of such a nature that it may be owned by separate persons acquires the character of an inherently dissoluble partnership in which the retention of my share is explicitly a matter of my arbitrary preference.

The nature of the elements

[2] makes it impossible for the use of them to become so particularized as to be the private possession of anyone.

In the Roman agrarian laws there was a clash between public and private ownership of land. The latter is the more rational and therefore had to be given preference even at the expense of other rights.

One factor in family testamentary trusts [i.e., the fact that the beneficiary has less than full ownership rights] contravenes the right of personality and so the right of private property. But the specific characteristics pertaining to private property may have to be subordinated to a higher sphere of right (e.g. to a society or the state), as happens, for instance, when private property is put into the hands of a so-called "artificial' person [e.g., a corporation] and into mortmain. Still, such exceptions to private property cannot be grounded in chance, in private caprice, or private advantage, but only in the rational organism of the state.

The general principle that underlies Plato's ideal state violates the right of personality by forbidding the holding of private property.

[3] The idea of a pious or friendly and even a compulsory brotherhood of men holding their goods in common and rejecting the principle of private property may readily present itself to the disposition which mistakes the true nature of the freedom of mind and right and fails to apprehend it in its determinate moments. As for the moral or religious view behind this idea, when Epicurus's friends proposed to form such an association holding goods in common, he forbade them, precisely on the ground that their proposal betrayed distrust and that those who

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[1] [The Philosophy of Right is a published set of lecture notes. The large type indicates note headings, the small type detail. The notes marked "[A]" were added not by Hegel but by a student on the basis of his notes of Hegel's actual lectures. Ed.]

[2] i.e. the four elements of early Greek cosmology-earth, air, fire, water. . . . [Translator's Note hereinafter "T.N."]

[3] i.e. If Hegel has Plato's Republic in mind, then he fails to notice that it is the Guardians only who are there precluded from holding private property. But he may be thinking of Laws, v. 739. [T.N.]

distrusted each other were not friends. [A] . . .

49. . . .

The demand sometimes made for an equal division of land, and other available resources too, is an intellectualism all the more empty and superficial in that at the heart of particular differences there lies not only the external contingency of nature but also the whole compass of mind, endlessly particularized and differentiated, and the rationality of mind developed into an organism.

We may not speak of the injustice of nature in the unequal distribution of possessions and resources, since nature is not free and therefore is neither just nor unjust. That everyone ought to have subsistence enough for his needs is a moral wish and thus vaguely expressed is well enough meant, but like anything that is only well meant it lacks objectivity. On the other hand, subsistence is not the same as possession and belongs to another sphere, i.e. to civil society. [A.]

50. The principle that a thing belongs to the person who happens to be the first in time to take it into his possession is immediately self-explanatory and superfluous, because a second person cannot take into his possession what is already the property of another. [A.]

51. Since property is the embodiment of personality, my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite. The embodiment which my willing thereby attains involves its recognizability by others.-The fact that a thing of which I can take possession is a res nullius is (see Paragraph 50) a self-explanatory negative condition of occupancy, or rather it has a bearing on the anticipated relation to others. [A.]

52. Occupancy makes the matter of the thing my property, since matter in itself does not belong to itself. . . .

53. Property has its modifications determined in the course of the will's relation to the thing. This relation is

(A) taking possession of the thing directly . . .;

(B) use . . .;

(C) alienation . . . .

Note

Clearly in order fully to understand what is going on in this passage you need to know more about Hegel's thought than we have space or competence to provide here. Those who wish to know more are referred to the edition from which this passage is taken and in particular to the guidance offered in the translator's Introduction and Notes. For a more complete description of Hegel's theory, including its place in Hegel's philosophical system, see H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 503–550 (1956); Forkosch, *Reflections Upon Hegel's Concept of Property*, *Contract*, *Punishment*, *and Constitutional Law*, 18 VAND. L. REV. 183 (1964).

Even without a full understanding of the theory, however, some of its elements are apparent. A person, Hegel says, must appropriate objects through the action of willing. This process of actualizing the will in the external world is the way in which the person realizes the freedom of his will. Private property, therefore, is a necessary institution for through it people achieve freedom.

The passage quoted above comes from the early portions of the work, before Hegel has talked at all about morality, civil society or the state. It probably will not surprise you that later on Hegel states that in civil society abstract "right is no longer merely implicit but has attained its

recognized actuality as the protection of property through the administration of justice." *Id.* at 208. It may surprise you to learn that he states: "In civil society, property rests on contract and on the formalities which make ownership capable of proof and valid in law. Original . . . titles and means of acquisition . . . are simply discarded in civil society and appear only as isolated accidents or as subordinated factors of property transactions." *Id.* at 217.

Thus, the property rights of individuals are always subject to higher classes of right, to the general will in whatever way it may be manifested, for example, through the state. The state, therefore, may, so long as it respects a right of private property, regulate ownership. But it may not do so arbitrarily. It must not command equal distribution since people do not have equal wills. The state, in other words, must regulate only to promote the greatest amount of freedom. It is obvious therefore that the personality theory is entirely different from the labor theory in terms of government regulation of private property.

There are several immediate objections to Hegel's theory. First, it is impossible to deduce from the theory any indication of how property should, in fact, be distributed and regulated. The theory is too vague to enable us to deduce any explicit legal consequences. It is not useful as a guide to specific legislation, but rather as a justification of the institution of private property and, secondarily, of state regulation with regard to that institution.

It has also been argued that private property may be antithetic to freedom because not everyone can be guaranteed the means by which to acquire property in competition with others. Here it would seem that in Hegel's conception it is the task of the state to see to it that a degree of freedom can be attained by as many as possible. Clearly, not everyone will be able to realize full freedom even in the most perfect state, but complete freedom is a goal that can be approached though perhaps never reached by all. *See* M. COHEN, LAW AND THE SOCIAL ORDER 53 (1933); H. CAIRNS, *supra*, at 519.

Hegel's theory has been used since its inception as a justification for governmental control of private property in many different political systems, e.g., Prussian Autocracy, Italian Fascism and German National Socialism. One noteworthy use of Hegel appeared in England in the nineteenth century among the school of Oxford Idealists. Fearing the evils of industrial capitalism, they urged state controls on property as a political and moral necessity. *See* R. SCHLATTER, *supra*, at 258–59.

On the other hand, the fourteenth amendment to the Constitution can also be viewed in the light of Hegel's theory: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const.Amend. XIV, 1. In some of the early cases that attempted to interpret the amendment we can clearly see that the Supreme Court had at least some of the principles of the Hegelian system in mind. But it did not always reach the same result. Compare, e.g., Lochner v. New York, 198 U.S. 45 (1905), which struck down a New York statute prohibiting employment in bakeries for more than 60 hours in one week or ten hours in one day, with Nebbia v. New York, 291 U.S. 502 (1934), which upheld the conviction of a grocer who had sold milk below the minimum price fixed by the Milk Control Board.

Today, the Hegelian theory is still used as an argument against unregulated capitalism; but it is also used to argue against socialism. The latter use appears to be mistaken to the extent that socialism does not aim at the extinction of private property but only that of private capital. *See* RASHDALL, THE PHILOSOPHICAL THEORY OF PROPERTY, IN PROPERTY, ITS RIGHTS AND DUTIES, 35, 66 (C. Gore 2d ed. 1922).

For more recent accounts of Hegel's analysis of property rights see J. WALDRON, THE RIGHT TO PRIVATE PROPERTY 343 (1988); Pottage, *Property: Re-appropriating Hegel*, 53 MOD. L. REV. 259 (1990); Stillman, *Hegel's Analysis of Property in the Philosophy of Right*, 10 CARDOZO L. REV. 1031 (1989). For an exploration of the relationship between property and personal

autonomy and self-development with references to Hegel and others see Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

While seldom specifically cited, Hegel's theory, or something very like it, appears in the reasoning of recent comments and opinions concerning government activity and private property rights:

FLEMMING V. NESTOR
Supreme Court of the United States.
363 U.S. 603 (1960).

[Nestor, the appellee, came to the United States from Bulgaria in 1913 and lived here continuously until July 1956, when he was deported for having been a Communist from 1933 to 1939. At that time Communist Party membership was neither illegal nor a statutory ground for deportation. >From December 1936 to January 1955 Nestor and his employers made regular payments under the Social Security Act. In 1954, Congress passed a law providing that any person deported because of past Communist Party membership would not receive Social Security benefits. Pursuant to this provision, section 202(n) of the Social Security Act, Nestor's benefits were terminated upon his deportation. The District Court for the District of Columbia held section 202(n) unconstitutional under the due process clause of the fifth amendment in that it deprived Nestor of an accrued property right.]

HARLAN, J. . . .

I.

We think that the District Court erred in holding that section 202(n) deprived appellee of an "accrued property right." 169 F. Supp., at 934. Appellee's right to Social Security benefits cannot properly be considered to have been of that order.

The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the "general welfare.' " Helvering v. Davis, [301 U.S. 619,] 640, whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments. . . .

To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands. [Citation omitted.] It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the Act. 1104, 49 Stat. 648, 42 U.S.C. § 1304. . . .

We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.

II.

This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of

sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of the cut-off provisions of section 202(n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. . . . Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Such is not the case here. The fact of a beneficiary's residence abroad-in the case of a deportee, a presumably permanent residence-can be of obvious relevance to the question of eligibility. One benefit which may be thought to accrue to the economy from the Social Security system is the increased overall national purchasing power resulting from taxation of productive elements of the economy to provide payments to the retired and disabled, who might otherwise be destitute or nearly so, and who would generally spend a comparatively large percentage of their benefit payments. This advantage would be lost as to payments made to one residing abroad. For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply. [Citations omitted.] Nor, apart from this can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute.

We need go no further to find support for our conclusion that this provision of the Act cannot be condemned as so lacking in rational justification as to offend due process.

III.

. . . It is said that the termination of appellee's benefits amounts to punishing him without a judicial trial, [citation omitted]; that the termination of benefits constitutes the imposition of punishment by legislative act, rendering section 202(n) a bill of attainder, [citations omitted]; and that the punishment exacted is imposed for past conduct not unlawful when engaged in, thereby violating the constitutional prohibition on ex post facto laws, [citation omitted]. Essential to the success of each of these contentions is the validity of characterizing as "punishment" in the constitutional sense the termination of benefits under section 202(n). . . .

Turning, then, to the particular statutory provision before us, appellee cannot successfully contend that the language and structure of section 202(n), or the nature of the deprivation, requires us to recognize a punitive design. Cf. Wong Wing v. United States, [163 U.S. 228] (imprisonment, at hard labor up to one year, of person found to be unlawfully in the country). Here the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the "infamous punishment" of imprisonment, as in Wong Wing, on which great reliance is mistakenly placed. . . .

BLACK, J., dissenting. . . . I agree with the District Court that the United States is depriving appellee, Ephram Nestor, of his statutory right to old-age benefits in violation of the United States Constitution.

. . . This action, it seems to me, takes Nestor's insurance without just compensation and in violation of the Due Process Clause of the Fifth Amendment. Moreover, it imposes an ex post facto law and bill of attainder by stamping him, without a court trial, as unworthy to receive that for which he has paid and which the Government promised to pay him. The fact that the Court is sustaining this action indicates the extent to which people are willing to go these days to overlook violations of the Constitution perpetrated against anyone who has ever even innocently belonged to the Communist Party.

I.

In Lynch v. United States, 292 U.S. 571, this Court unanimously held that Congress was without power to repudiate and abrogate in whole or in part its promises to pay amounts claimed by soldiers under the War Risk Insurance Act of 1917, §§ 400–405, 40 Stat. 409. This Court held that such a repudiation was inconsistent with the provision of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Court today puts the Lynch case aside on the ground that "It is hardly profitable to engage in conceptualizations regarding "earned rights' and "gratuities.' " From this sound premise the Court goes on to say that while "The "right' to Social Security benefits is in one sense "earned,' " yet the Government's insurance scheme now before us rests not on the idea of the contributors to the fund earning something, but simply provides that they may "justly call" upon the Government "in their later years, for protection from "the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.' " These are nice words but they cannot conceal the fact that they simply tell the contributors to this insurance fund that despite their own and their employers' payments the Government, in paying the beneficiaries out of the fund, is merely giving them something for nothing and can stop doing so when it pleases. This, in my judgment reveals a complete misunderstanding of the purpose Congress and the country had in passing that law. It was then generally agreed, as it is today, that it is not desirable that aged people think of the Government as giving them something for nothing. . . . The people covered by this Act are now able to rely with complete assurance on the fact that they will be compelled to contribute regularly to this fund whenever each contribution falls due. I believe they are entitled to rely with the same assurance on getting the benefits they have paid for and have been promised, when their disability or age makes their insurance payable under the terms of the law. The Court did not permit the Government to break its plighted faith with the soldiers in the Lynch case; it said the Constitution forbade such governmental conduct. I would say precisely the same thing here. The Court consoles those whose insurance is taken away today, and others who may suffer the same fate in the future, by saying that a decision requiring the Social Security system to keep faith "would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands." People who pay premiums for insurance usually think they are paying for insurance, not for "flexibility and boldness." I cannot believe that any private insurance company in America would be permitted to repudiate its matured contracts with its policyholders who have regularly paid all their premiums in reliance upon the good faith of the company. It is true, as the Court says, that the original Act contained a clause, still in force, that expressly reserves to Congress "[t]he right to alter, amend, or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U.S.C. § 1304. Congress, of course, properly retained that power. It could repeal the Act so as to cease to operate its old-age insurance activities for the future. This means that it could stop covering new people, and even stop increasing its obligations to its old contributors. But that is quite different from disappointing the just expectations of the contributors to the fund which the Government has compelled them and their employers to pay its Treasury. There is nothing "conceptualistic" about saying, as this Court did in Lynch, that such a taking as this the Constitution forbids.

II.

In part II of its opinion, the Court throws out a line of hope by its suggestion that if Congress in the future cuts off some other group from the benefits they have bought from the Government, this Court might possibly hold that the future hypothetical act violates the Due Process Clause. In doing so it reads due process as affording only minimal protection, and under this reading it will protect all future groups from destruction of their rights only if Congress "manifests a patently arbitrary classification, utterly lacking in rational justification." . . . And yet the Court's assumption of its power to hold Acts unconstitutional because the Court thinks they are arbitrary and irrational can be neither more nor less than a judicial foray into the field of governmental

policy. By the use of this due process formula the Court does not, as its proponents frequently proclaim, abstain from interfering with the congressional policy. It actively enters that field with no standards except its own conclusion as to what is "arbitrary" and what is "rational." And this elastic formula gives the Court a further power, that of holding legislative Acts constitutional on the ground that they are neither arbitrary nor irrational even though the Acts violate specific Bill of Rights safeguards. [Citation omitted.] Whether this Act had "rational justification" was, in my judgment, for Congress; whether it violates the Federal Constitution is for us to determine, unless we are by circumlocution to abdicate the power that this Court has been held to have ever since Marbury v. Madison, 1 Cranch 137.

[BRENNAN, J., dissented on other grounds, joined by WARREN, C.J., and DOUGLAS, J., the latter adding his own separate dissenting opinion.]

Notes and Questions

1. For further thoughts on Government largess as "property" and a critical discussion of the principal case, see Reich, *The New Property*, 73 YALE L.J. 733 (1964), excerpted *infra* p. 155. *See also* Note, *Charity Versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357 (1963).

2. Having decided that Nestor did not have an "accrued property right" in his Social Security benefits why did the Court have to reach the issue discussed in Part II? The Fifth Amendment to the United States Constitution declares that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Similar provisions exist in all state constitutions. Further, the Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") Is it possible that "property" in the first clause of the Fifth Amendment quoted above means something different from "private property" in the second clause?

3. Reconsider the Bentham extract *supra* p. 133. Does the opinion in the principal case make more sense if we take a Benthamite view of property or if we take an Hegelian view?

4. Although less explicitly than the Fifth, the Fourth Amendment also gives constitutional recognition to property in its guarantee of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (Emphasis supplied.) As with the Fifth, a continuing question is the extent to which the amendment's protection against government action rests upon the property concepts which are dispositive in disputes between private individuals. Consider some of the ways that question can arise:

(a) Government officials secure information by covert surveillance but without trespassing on any property of the person being observed. Compare Silverman v. United States, 365 U.S. 505 (1961) (the "spike-mike" case) with Katz v. United States, 389 U.S. 347 (1967) (the telephone booth case). In both cases the searches were held illegal, but the latter case is regarded as having made or announced a shift from the property-based holding of Silverman (the spike-mike constituting a technical trespass) to an expectation-of-privacy test (even though one has no property interest in the phone booth one does not expect one's conversations there to be overheard). Although extending fourth amendment protection to situations not covered by a "property"-based interpretation, Katz contained a limiting notion that has in the decades since undercut much of its promise. Reasonable expectations of privacy do not exist, Katz suggested, as to things "knowingly expose[d] to the public." "Knowing exposure" has led to the rejection of Fourth Amendment claims in a wide range of circumstances. *See* Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549 (1990).

(b) Evidence is obtained by government agents trespassing on land owned by the person under investigation but without entering his house. (Recall the amendment's precise language: "persons, houses, papers, and effects.") *See* United States v. Dunn, 480 U.S. 294 (1987) (agents crossed perimeter fence and several barbed wire fences to inspect area around barn); Oliver v. United States, 466 U.S. 170 (1984) (agents drove past house to locked gate with "No Trespassing" sign which they then walked around).

(c) The owner of a hotel, through an agent, consents to a warrantless search of a room in the hotel; the guest, a mere licensee, complains of a Fourth Amendment violation. *See* Stoner v. California, 376 U.S. 483 (1964); Abel v. United States, 362 U.S. 217 (1960). In Stoner the search was struck down; in Abel it was sustained, apparently on the ground that at the time of the search the occupant had vacated his room and his right to possession had reverted to the hotel.

(d) Government agents secure evidence by flying over an individual's home, utilizing the "navigable airspace" of the United States (see p. 280 *infra*). *See* Florida v. Riley, 488 U.S. 445 (1989) (surveillance from a helicopter circling twice over property at 400 feet, not a search); California v. Ciraolo, 476 U.S. 207 (1986) ("naked-eye" inspection of backyard using fixed-wing aircraft at 1,000 feet, not a search).

See generally Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND.L.J. 549 (1990); Comment, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST.L.J. 709 (1977); Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATHOLIC U. L. REV. 1 (1971).

REICH, THE NEW PROPERTY

73 YALE L.J. 733, 739–40, 744–46, 771–74, 778, 785–87 (1964).

The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.

One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth-forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess-allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society. . . .

II. The Emerging System of Law

Wealth or value is created by culture and by society; it is culture that makes a diamond

valuable and a pebble worthless. Property, on the other hand, is the creation of law. A man who has property has certain legal rights with respect to an item of wealth; property represents a relationship between wealth and its "owner." Government largess is plainly "wealth," but it is not necessarily "property."

Government largess has given rise to a distinctive system of law. This system can be viewed from at least three perspectives: the rights of holders of largess, the powers of government over largess, and the procedure by which holders' rights and governmental power are adjusted. At this point, analysis will not be aided by attempting to apply or to reject the label "property." What is important is to survey-without the use of labels-the unique legal system that is emerging.

A. Individual Rights In Largess

As government largess has grown in importance, quite naturally there has been pressure for the protection of individual interests in it. The holder of a broadcast license or a motor carrier permit or a grazing permit for the public lands tends to consider this wealth his "own," and to seek legal protection against interference with his enjoyment. The development of individual interests has been substantial, but it has not come easily.

From the beginning, individual rights in largess have been greatly affected by several traditional legal concepts, each of which has had lasting significance:

Right vs. privilege. The early law is marked by courts' attempts to distinguish which forms of largess were "rights" and which were "privileges." Legal protection of the former was by far the greater. If the holder of a license had a "right," he might be entitled to a hearing before the license could be revoked; a "mere privilege" might be revoked without notice or hearing.

The gratuity principle. Government largess has often been considered a "gratuity" furnished by the state. Hence it is said that the state can withhold, grant, or revoke the largess at its pleasure. Under this theory, government is considered to be in somewhat the same position as a private giver.

The whole and the parts. Related to the gratuity theory is the idea that, since government may completely withhold a benefit, it may grant it subject to any terms or conditions whatever. This theory is essentially an exercise in logic: the whole power must include all of its parts.

Internal management. Particularly in relation to its own contracts, government has been permitted extensive power on the theory that it should have control over its own housekeeping or internal management functions. Under this theory, government is treated like a private business. In its dealings with outsiders it is permitted much of the freedom to grant contracts and licenses that a private business would have. . . .

In all of the cases concerning individual rights in largess the exact nature of the government action which precipitates the controversy makes a great difference. A controversy over government largess may arise from such diverse situations as denial of the right to apply, denial of an application, attaching of conditions to a grant, modification of a grant already made, suspension or revocation of a grant, or some other sanction. In general, courts tend to afford the greatest measure of protection in revocation or suspension cases. The theory seems to be that here some sort of rights have "vested" which may not be taken away without proper procedure. On the other hand, an applicant for largess is thought to have less at stake, and is therefore entitled to less protection. The mere fact that a particular form of largess is protected in one context does not mean that it will be protected in all others.

While individual interests in largess have developed along the lines of procedural protection and restraint upon arbitrary official action, substantive rights to possess and use largess have

remained very limited. In the first place, largess does not "vest" in a recipient; it almost always remains revocable. . . . Forfeiture may take place because the public interest demands it, despite the absence of any fault in the holder. In a recent case the Civil Aeronautics Board took the position that "the public interest" would be furthered by cancelling the certificate of the most successful of four competing air carriers in order to help the others, which needed government subsidies. When the public interest demands that the government take over "property," the Constitution requires that just compensation be paid to the owner. But when largess is revoked in the public interest, the holder ordinarily receives no compensation. For example, if a television station's license were revoked, not for bad behavior on the part of the operator, but in order to provide a channel in another locality, or to provide an outlet for educational television, the holder would not be compensated for its loss. This principle applies to largess of all types.

In addition to being revocable without compensation, most forms of largess are subject to considerable limitations on their use. Social Security cannot be sold or transferred. A television license can be transferred only with FCC permission. The possessor of a grazing permit has no right to change, improve, or destroy the landscape. And use of most largess is limited to specified purposes. Some welfare grants, for example, must be applied to support dependent children. On the other hand, holders of government wealth usually do have a power to exclude others, and to realize income.

The most significant limitation on use is more subtle. To some extent, at least, the holder of government largess is expected to act as the agent of "the public interest" rather than solely in the service of his own self-interest. The theory of broadcast licensing is that the channels belong to the public and should be used for the public's benefit, but that a variety of private operators are likely to perform this function more successfully than government; the holder of a radio or television license is therefore expected to broadcast in "the public interest." The opportunity for private profit is intended to serve as a lure to make private operators serve the public.

The "mix" of public and private, and the degree to which the possessor acts as the government's agent, varies from situation to situation. The government contractor is explicitly the agent of the government in what he does; in theory he could equally well be the manager of a government-owned factory. Only his right to profits and his control over how the job is done distinguish his private status. The taxi driver performs the public service of transportation (which the government might otherwise perform) subject to regulation but with more freedom than the contractor. The doctor serves the public with still greater freedom. The mother of a child entitled to public aid acts as the state's agent in supporting the child with the funds thus provided, but her freedom is even greater and the responsibility of her agency still less defined.

The result of all of this is a breaking down of distinctions between public and private and a resultant blurring or fusing of public and private. Many of the functions of government are performed by private persons; much private activity is carried on in a way that is no longer private. . . .

IV. Property and the Public Interest: An Old Debate Revisited

The public interest state, as visualized above, represents in one sense the triumph of society over private property. This triumph is the end point of a great and necessary movement for reform. But somehow the result is different from what the reformers wanted. Somehow the idealistic concept of the public interest has summoned up a doctrine monstrous and oppressive. It is time to take another look at private property, and at the "public interest" philosophy that dominates its modern substitute, the largess of government.

A. Property and Liberty

Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of

these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done.

Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and "antisocial" activities are given the protection of law; the owner may do what all or most of his neighbors decry. The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.

Property is not a natural right but a deliberate construction by society. If such an institution did not exist, it would be necessary to create it, in order to have the kind of society we wish. The majority cannot be expected, on specific issues, to yield its power to a minority. Only if the minority's will is established as a general principle can it keep the majority at bay in a given instance. Like the Bill of Rights, property represents a general, long range protection of individual and private interests, created by the majority for the ultimate good of all.

Today, however, it is widely thought that property and liberty are separable things; that there may, in fact, be conflicts between "property rights" and "personal rights." Why has this view been accepted? The explanation is found at least partly in the transformations which have taken place in property.

During the industrial revolution, when property was liberated from feudal restraints, philosophers hailed property as the basis of liberty, and argued that it must be free from the demands of government or society. But as private property grew, so did abuses resulting from its use. In a crowded world, a man's use of his property increasingly affected his neighbor, and one man's exercise of a right might seriously impair the rights of others. Property became power over others; the farm landowner, the city landlord, and the working man's boss were able to oppress their tenants or employees. Great aggregations of property resulted in private control of entire industries and basic services capable of affecting a whole area or even a nation. At the same time much private property lost its individuality and in effect became socialized. Multiple ownership of corporations helped to separate personality from property, and property from power. When the corporations began to stop competing, to merge, agree, and make mutual plans, they became private governments. Finally, they sought the aid and partnership of the state, and thus by their own volition became part of public government.

These changes led to a movement for reform, which sought to limit arbitrary private power and protect the common man. Property rights were considered more the enemy than the friend of liberty. The reformers argued that property must be separated from personality. . . .

The struggle between abuse and reform made it easy to forget the basic importance of individual private property. The defense of private property was almost entirely a defense of its abuses-an attempt to defend not individual property but arbitrary private power over other human beings. Since this defense was cloaked in a defense of private property, it was natural for the reformers to attack too broadly. Walter Lippmann saw this in 1934:

But the issue between the giant corporation and the public should not be allowed to obscure

the truth that the only dependable foundation of personal liberty is the economic security of private property. . . .

For we must not expect to find in ordinary men the stuff of martyrs, and we must, therefore, secure their freedom by their normal motives. There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely.

The reform took away some of the power of the corporations and transferred it to government. In this transfer there was much good, for power was made responsive to the majority rather than to the arbitrary and selfish few. But the reform did not restore the individual to his domain. What the corporation had taken from him, the reform simply handed on to government. And government carried further the powers formerly exercised by the corporation. Government as an employer, or as a dispenser of wealth, has used the theory that it was handing out gratuities to claim a managerial power as great as that which the capitalists claimed. Moreover, the corporations allied themselves with, or actually took over, part of government's system of power. Today it is the combined power of government and the corporations that presses against the individual.

From the individual's point of view, it is not any particular kind of power, but all kinds of power, that are to be feared. This is the lesson of the public interest state. The mere fact that power is derived from the majority does not necessarily make it less oppressive. Liberty is more than the right to do what the majority wants, or to do what is "reasonable." Liberty is the right to defy the majority, and to do what is unreasonable. The great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority.

The reform, then, has not done away with the importance of private property. More than ever the individual needs to possess, in whatever form, a small but sovereign island of his own.

B. Largess and the Public Interest

The fact that the reform tended to make much private wealth subject to "the public interest" has great significance, but it does not adequately explain the dependent position of the individual and the weakening of civil liberties in the public interest state. The reformers intended to enhance the values of democracy and liberty; their basic concern was the preservation of a free society. But after they established the primacy of "the public interest," what meaning was given to that phrase? In particular, what values does it embody as it has been employed to regulate government largess?

Reduced to simplest terms, "the public interest" has usually meant this: government largess may be denied or taken away if this will serve some legitimate public policy. The policy may be one directly related to the largess itself, or it may be some collateral objective of government. A contract may be denied if this will promote fair labor standards. A television license may be refused if this will promote the policies of the antitrust laws. Veterans benefits may be taken away to promote loyalty to the United States. A liquor license may be revoked to promote civil rights. A franchise for a barber's college may not be given out if it will hurt the local economy, nor a taxi franchise if it will seriously injure the earning capacity of other taxis.

Most of these objectives are laudable, and all are within the power of government. The great difficulty is that they are simplistic. Concentration on a single policy or value obscures other values that may be at stake. Some of these competing values are other public policies; for example, the policy of the best possible television service to the public may compete with observance of the antitrust laws. The legislature is the natural arbiter of such conflicts. But the conflicts may also be more fundamental. In the regulation of government largess, achievement of specific policy goals may undermine the independence of the individual. Where such conflicts exist, a simplistic notion of the public interest may unwittingly destroy some values. . . .

V. Toward Individual Stakes in the Commonwealth

Ahead there stretches-to the farthest horizon-the joyless landscape of the public interest state. The life it promises will be comfortable and comforting. It will be well planned-with suitable areas for work and play. But there will be no precincts sacred to the spirit of individual man.

There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private governments which would rule not in the public interest, but in their own interest. If individualism and pluralism are to be preserved, this must be done not by marching backwards, but by building these values into today's society. If public and private are now blurred, it will be necessary to draw a new zone of privacy. If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do. . . .

. . . From Largess to Right

The proposals discussed above, however salutary, are by themselves far from adequate to assure the status of individual man with respect to largess. The problems go deeper. First, the growth of government power based on the dispensing of wealth must be kept within bounds. Second, there must be a zone of privacy for each individual beyond which neither government nor private power can push-a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon relationship and status-status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.

Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. Like property, such largess could be governed by a system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension and revocation. As things now stand, violations lead to forfeitures-outright confiscation of wealth and status. But there is surely no need for these drastic results. Confiscation, if used at all, should be the ultimate, not the most common and convenient penalty. The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community.

The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual, such as technological change, variations in demand for goods, depressions, or wars. The aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny. . . .

At the very least, it is time to reconsider the theories under which new forms of wealth are regulated, and by which governmental power over them is measured. It is time to recognize that "the public interest" is all too often a reassuring platitude that covers up sharp clashes of conflicting values, and hides fundamental choices. It is time to see that the "privilege" or

"gratuity" concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public.

Above all, the time has come for us to remember what the framers of the Constitution knew so well-that "a power over a man's subsistence amounts to a power over his will." We cannot safely entrust our livelihoods and our rights to the discretion of authorities, examiners, boards of control, character committees, regents, or license commissioners. We cannot permit any official or agency to pretend to sole knowledge of the public good. We cannot put the independence of any man . . . wholly in the power of other men.

If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work. Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today-a Homestead Act for rootless twentieth century man. We must create a new property.

Note

Professor Reich's article proved to be influential. *See* p. 112 n. 4 *supra*. In Goldberg v. Kelly, 397 U.S. 254 (1970), with citations to The New Property, the Supreme Court held that the termination of welfare payments without a hearing violated the Fourteenth Amendment due process clause. But then the Court seemed to retreat. In Wyman v. James, 400 U.S. 309, 319 (1971), it held that a welfare recipient might not refuse home visits of a caseworker on the ground, among others, that: "One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same."

The most extensive testing of the idea of the "new property" was in a series of cases involving the dismissals of public employees.

Summary Note

We suggested above p. 154 that *Flemming* might be regarded as involving two issues: whether there had been a taking of Nestor's property and whether Nestor had been deprived of property without due process. If the meaning of the word "property" in the two phrases were the same, there would be no need to consider the second question once we had decided in answering the first that there was no property involved. Recent due process cases have tended to confirm the notion that interests which would not qualify as "property" under the takings clause may still be sufficiently like property (or "liberty") that the state cannot deprive an individual of them without some kind of due process. The precise contours of the concept of property and that of due process are by no means clear, however, and at least some commentators saw Bishop v. Wood as a rejection of the very concept of the "new property":

> Summing up, I believe it is a fair resumé of the principal post-Goldberg doctrinal developments in the new property and procedural due process to suggest the following:
>
> (1) Given a knowledgeable legislature (whether state or federal), sufficiently careful in establishing a new feudalism under which basic wants and needs (jobs, education, housing, welfare, food, medical aid) in the sprawling public sector are tenurial, uncertain, contingent, dependent, and subordinate to the administrative sheriffs of the Administrative State, "due

process of law" is the same as "due process of those laws which the legislature provided." In brief, what you get is what you see.

(2) Given a clumsy legislature, i.e., one inartful in describing things as "conditions precedent" or "conditions subsequent," or careless enough to describe a status as "permanent," what you get may be even *less* than what you see.[1]

(3) To the extent that one may get more than what one sees (*i.e.*, more than the procedural amenities provided by extraconstitutional legal sources), it will occur because a federal or state court separates the property vested in a person from the procedural limitations entwined in the description of that property.[2] Having navigated successfully between the Scylla of legislative ingenuity and the Charybdis of hostile judicial interpretation, one may then arrive in the land of "due process of law"-only to discover that it is a veritable desert.[3]

Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 469–70 (1977).

Consider Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) in the light of Professor Van Alstyne's analysis. In *Loudermill*, the Supreme Court was confronted with "due process" claims arising out of the dismissal of school employees, civil servants that Ohio law specified could only be terminated for cause. Ohio law also provided a procedure for administrative review. Justice White's opinion for the Court began with the finding that Ohio law gave the employees "a property right" in continued employment. The opinion goes on to reject the school board's argument that "the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation":

The point is straightforward: the Due Process Clause provides that certain substantive rights-life, liberty, and property-cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards."

Id. at 541. Holding that due process required at least some opportunity for a hearing before termination the Court remanded the case for a determination whether such a hearing had been provided. *Id.* at 542–45.

What would Van Alstyne's "knowledgeable legislature" have to do in order to set up categories of public employment in which a hearing would not be required before termination? In order to keep categories of public employment from being "property"?

Some of the more recent government benefit cases require more precise definition of the nature of the "property" interest that is conceded to exist. If a public employee has a constitutionally protected "property" interest does it lie in the particular job or simply in assured compensation. The issue arises, for example, when a tenured school teacher or professor is reassigned to a different department or to new duties or no duties at all, with no loss of pay. *See*

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[1] See Bishop v. Wood, 426 U.S. 341 (1976).

[2] E.g., Arnett v. Kennedy, 416 U.S. 134 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970).

[3] See, e.g., Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Cafeteria & Rest. Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

Huang v. Board of Governors, 902 F.2d 1134 (4th Cir.1990).

The body of case law giving some form of procedural protections to persons having interests in what is concededly property but where the law traditionally has allowed a third party to claim it without a hearing is confused but substantial. *See* pp. 53–54 *supra*. So too are the number of recent cases which give compensation for the loss of expectations not traditionally classified as "property" when they are frustrated by government action. E.g., p. 145 *supra*.

The "new property" concept may not be robust. It is not dead. There are many cases both before and after *Bishop v. Wood*, not overruled, which require procedural protection to be accorded one who is being denied government benefits. In addition to *Loudermill*, *supra*, *see*, *e.g.*, *Goldberg v. Kelly*, *supra* p. 162; *Perry v. Sindermann*, *supra* p. 162; Arnett v. Kennedy, 416 U.S. 134 (1974) (discussed in the principal case); *cf*. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (state statute authorizing police chief to "post" names of excessive drinkers in retail liquor outlets so that they will not be sold or given alcoholic beverages held unconstitutional in that it "brands" a person without giving him an opportunity for hearing); Goss v. Lopez, 419 U.S. 565 (1975) (suspension from public school an infringement on "liberty" and must be accompanied by a hearing); Vitek v. Jones, 445 U.S. 480 (1980) (state prisoner entitled to hearing before transfer to a mental institution; considerable language indicating continuing validity of Arnett). *See generally* L.TRIBE, AMERICAN CONSTITUTIONAL LAW 10–9 to 10–19 (2d ed. 1988). And if the Supreme Court in Wood seemed to make the granting of procedural protection dependent on state law, some states, at least, are willing to grant it. *See*, *e.g.*, People v. Ramirez, 25 Cal.3d 260, 158 Cal.Rptr. 316, 599 P.2d 622 (1979) (convicted criminal entitled under California Constitution to hearing upon his exclusion from California Rehabilitation Center). There is also a body of cases which denies to the state either on due process or contract clause grounds the power to change by legislation benefits which they have granted and which are in some sense vested. *See*, *e.g.*, Opinion of the Justices, 364 Mass. 847, 303 N.E.2d 320 (1973) (state employees' pension plan); *cf*. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contract clause forbids New Jersey from withdrawing promised support for deficit transit operations from Port of New York Authority).

The twenty-fifth anniversary of Reich's article and the twentieth anniversary of Goldberg v. Kelly, *supra*, occasioned a number of "new property" retrospectives. *See Symposium: The New Property and the Individual-25 Years Later*, 24 U.S.F. L. REV. 221 (1990); *The Legacy of Goldberg v. Kelly: a Twenty Year Perspective*, 56 BROOKLYN L. REV. 729 (1990); Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1990); Fleischmann, *A Cultural Historian's Reading of Charles Reich's Impact on the Contemporary Discourse on "Welfare"*, 31 WM. & MARY L. REV. 307 (1990); Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365 (1990).

Section 3. THE MARXIST ATTACK AND THE LIBERAL RESPONSE— HEREIN OF PROPERTY RIGHTS VS. CIVIL RIGHTS

Hegel's is perhaps the last great philosophical theory of property. Since Hegel's time the theorists of property have tended to come from the social sciences (categorizing broadly and regarding Marx as a social scientist). Here the problem of selection becomes even more difficult